IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1625

ARLEN REALTY AND DEVELOPMENT CORPORATION, a corporation, and ATLANTIC DEPARTMENT STORES, INC., a corporation,

Petitioners,

vs.

CONDOR CORPORATION, a Minnesota corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The Respondent, Condor Corporation, submits this brief in opposition to the Petition of Arlen Realty and Development Corporation and Atlantic Department Stores, Inc. for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on February 10, 1976.

INTRODUCTION

In accordance with Rule 40 of the Rules of this Court, Respondent accepts the Petitioners' recital of the opinion of the United States Court of Appeals for the Eighth Circuit, the Petitioners' invocation of jurisdiction, limited to 28 USC §1254(1), and attaches hereto, as an Appendix, portions of the Findings of Fact, Conclusions of Law and Order for Judgment entered by the District Court, District of Minnesota, Third Division, on May 7, 1975. However, the Respondent is dissatisfied with the Petitioners' formulation of the questions presented and their argumentative statement of the case, and presents its supplements and revisions below.

QUESTIONS PRESENTED

1. Does a diversity case involving only settled questions of state law present "special and important reasons" for review by writ of certiorari?

2. Did the Court of Appeals, in a

landlord's action for unpaid rent following abandonment of leased premises properly affirm a conclusion that the landlord acted reasonably in its efforts to mitigate damages after re-entry into the premises?

3. Was interest on unpaid rent properly allowed, under applicable Minnesota law, in a landlord's action for unpaid rent following abandonment of leased premises?

STATEMENT OF THE CASE

This diversity action presents neither important questions of general application, inter-circuit conflict, departure from accepted practices, nor any other special considerations. It involves nothing more than Petitioners' reassertion of contentions properly decided adversely to them at each step of the proceedings below in a landlord-tenant dispute governed by established Minnesota law.

Simply stated, Petitioners (hereafter Arlen and Atlantic) entered into commercial premises as tenants under a written lease and thereafter abandoned the premises during the term of the lease. Respondent, (hereafter Condor) the lessor, re-entered the premises without forfeiture of its right to rent for the remainder of the unexpired term. Respondent diligently attempted to mitigate damages by reletting the premises but, as found by the District Court, has not "received, refused to consider or rejected any proposals from a prospective tenant relating to the rental of either all or part of the leased premises". (Findings, ¶25, A. 5).

Condor brought this action in the Federal District Court, based upon diversity jurisdiction, for unpaid rents. The case was tried to the Court, without a jury, and, upon Findings of Fact and Conclusions of Law, applying Minnesota substantive law, a money judgment was entered against Arlen and Atlantic. On appeal, following waiver of oral argument

by Petitioners, the United States Court of Appeals for the Eighth Circuit affirmed per curiam.

Petitioners, arguing from what they believe the "lower Court record indicates" (Pet. p. 6) ignore the District Court Findings that Condor's "efforts have been extensive, diligent and varied" (Findings, ¶15, A-1) and the minute description of those efforts constituting over a quarter of the Findings and Conclusions. The Court of Appeals was "abundantly satisfied that the Findings were not clearly erroneous" (Pet. A-6) and were "amply supported by the record." (Pet. A-6). Petitioners select three or four hindsight enhanced particulars to suggest that Condor failed to do something it should have done. Although conceding that Condor's best effort were "possibly reasonable" (Pet., p. 4), Petitioners use their selective statement of the case to argue that "professional assistance" (Pet., p. 4) was essential to reasonableness.

To advance this theory, Petitioners must and do ignore the detailed Findings of the District Court relating to Condor's efforts to find new tenants. The Court found that Condor contacted all major retailers in the area (Findings, ¶16, A-1-2); contacted governmental agencies, placed an advertising sign and granted non-exclusive agencies to realtors (Findings, ¶17, A-2-3); consulted an architect for conversion to multiple tenant use and contacted drug and hardware stores as prospective lead tenants in a multiple tenant conversion (Findings, ¶18, A-3); ran classified newspaper advertisements (Findings, ¶19, A-3-4); conducted a telephone solicitation and canvass (Findings, ¶20, A-4); submitted written proposals to governmental agencies (Findings, ¶21, A-4-5); and entered into short term trial leases and rented portions of the premises for temporary auto storage (Findings, ¶24, A-5). These facts, as found by the District Court and affirmed by the Court of Appeals, supplement the

sketchy[1] statement of the case presented by Petitioners.

ARGUMENT

NO SPECIAL OR IMPORTANT REASONS EXIST FOR GRANTING REVIEW ON CERTIORARI

Petitioners' bare assertion that the questions presented are of "great and recurring significance" (Pet., p. 10) falls far short of the considerations specified in Rule 19 of this Court describing the character of the reasons for granting review on certiorari. The settled nature of controlling Minnesota law on the issues presented renders the case important only to the parties.

The writ is not to be granted "except in cases involving principles the settlement of which is of importance to the public, as

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[1] No mention is made of Petitioners' own extensive efforts, presumably both experienced and skillful, but also futile, to find a replacement tenant. (Findings, ¶26 27, A-6-7).

distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." Rice vs. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79 (1955); Layne & Bowler Corp. vs. Western Well Works, Inc., 261 U.S. 387, 393 (1923). This case is devoid of public importance. The lease in suit was and is of considerable significance to the parties but the questions concerning it raised by the petitioners are insignificant, and, as often stated by this Court in declining to issue the writ, review of them "would be of no importance save to the litigants themselves". Rudolph vs. United States, 370 U.S. 269, 270 (1962).

THE COURT OF APPEALS PROPERLY APPLIED MINNESOTA LAW TO CONDOR'S EFFORTS TO MITIGATE ITS DAMAGES BY RELETTING THE PREMISES.

As the District Court held, under Minnesota law a lessor who accepts the abandonment of leased premises assumes the

obligation "to use reasonable efforts to mitigate such damages subsequent to the breach". Gruman vs. Investors Diversified Services, 247 Minn. 502, 508, 78 N.W. 2d 377, 381 (1956). Carpenter vs. Wisnieski, 139 Ind. App. 325, 215 N.E. 2d 882 (1966) extensively relied upon by petitioners here and below, while not controlling, is certainly not contrary:

> "[L]essor is required to use such diligence as would be exercised by a reasonably prudent man under the circumstances. The question is for the trier of fact. (emphasis added)." Id at 215 N.E. 2d 884.

The District Court concluded that precisely this standard applied:

> Whether Condor fulfilled its duty of reasonable efforts is to be determined from all of the facts and circumstances of the case, including the terms of the existing Lease, the nature of the property involved, and the nature and extent of Condor's efforts to find a tenant or tenants. Carpenter vs. Wisnieski, 139 Inc. App. 325, 215 N.E. 2d 882 (1966). (Conclusions, ¶4, A-7-8)

It then properly applied the law to the facts as it found them and determined that there

was "no evidence" from which it "might conclude or infer that had Condor taken additional or different actions, its efforts may have met with success in whole or in part." (Conclusions, ¶6, A-8). The evidence permitted "only the conclusion that Condor made a good faith and reasonable effort to find a tenant or tenants." (Conclusions, ¶6,A-8).[2]

Petitioners, in reality, argue not for the application of the proper standard of law, but for an opportunity to relitigate the facts. However, "jurisdiction to review by writ of certiorari was not conferred upon the [Supreme Court] merely to give the defeated party in the Circuit Court of Appeals another hearing." Magnum Import Co. v. Coty, 262 U.S. 159, 162 (1923). The Court of

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[2] Another illustration of the District Court's understanding of the applicable law appears in the Transcript of April 30, 1975, where Judge Devitt stated the standard was that of "a reasonably prudent landlord under the circumstances." (Tr., p. 24).

Appeals properly held these contentions to be "devoid of merit". (Pet., A-5). Petitioners' desire to make success the sole test of reasonableness does not present a sound basis for grant of their petition.

THE COURT OF APPEALS PROPERLY APPLIED MINNESOTA LAW TO AFFIRM THE AWARD OF INTEREST ON UNPAID RENTS

For the third time Petitioners contest their liability for some $2,000 in interest on rents they failed to pay. The precise question of whether prejudgment interest is allowable on a liquidated claim for money damages, subject to possible set-offs, has been long settled in Minnesota:

> Where the amount due under a contract is liquidated, but reduced by an unliquidated set-off, interest is allowable on the difference from the time it originally became due. 5B Dun. Dig. (3rd ed.) §2524; Spurck vs. Civil Service Board, 221 Minn. 183, 42 N.W.2d 720 (1950); Knutson vs. Lasher, 219 Minn. 594, 19 N.W.2d 688 (1945); Grand Forks Lumber Co. vs. McClure Logging Co., 103 Minn. 471, 115 N.W. 406 (1908).

Petitioners misplace reliance on two clearly distinguishable breach of warranty and negligence cases, Moosbrugger v. McGraw-Edison

Company, 284 Minn. 143, 170 N.W.2d 72 (1964) and Potter v. Hartzell Propeller, Inc. 291 Minn. 513, 189 N.W.2d 499 (1971), and a fire insurance damages action, Employers Liability Insurance Co., v. Morse, 261 Minn. 259, 111 N.W.2d 620 (1961). These cases are distinguishable as involving unliquidated claims much like actions for personal injuries, seduction, libel, slander and false imprisonment. See Swanson v. Andrus, 83 Minn. 505, 86 N.W. 465 (1901). A bona fide dispute as to the amount of a claim not constituting a bar to the accrual of interest, Lacey v. Duluth, Mesabi Iron Range Railway Co., 236 Minn. 104, 51 N.W.2d 831 (1952), the Circuit Court correctly held that "the allowance of interest was proper" (Pet. A-8)under controlling Minnesota law. Nothing presented by Petitioners warrants review of this decided question by this Court on writ of certiorari.

CONCLUSION

For the foregoing reasons, the respondent respectfully requests that the Petitioner for a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joe A. Walters, one of the attorneys for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of June, 1976, I served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari together with three copies of the Appendix in this cause, upon Petitioners by depositing same in the United States mail, postage prepaid, and addressed to Petitioners' attorneys of record, Vance B. Grannis, Jr. and Grannis and Grannis, 403 Northwestern National Bank Building, 161 North Concord Street, South Saint Paul, Minnesota, 55075.

/s/ JOE A. WALTERS

JOE A. WALTERS

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER FOR JUDGMENT

* * *

FINDINGS OF FACT

* * *

15. Continuously from and after the time of Atlantic's public announcement that it would be closing its business in the Shopping Center, to the time of trial, Condor has attempted to find a new tenant or tenants for the building. Its efforts have been extensive, diligent and varied.

16. During the first several months, both before and after the unlawful detainer proceeding, Condor largely concentrated its efforts on finding a single tenant for the building, a tenant conducting a retail department store business similar to that provided for in the Lease, and similar to that conducted by Atlantic. It personally dealt with representatives of the major discount department stores in this area, namely, the Target, K-Mart, Holiday Village and Zayre's

Shoppers City chains; provided information to them; and toured the premises on several occasions with representatives of Holiday Village and Target. None of the efforts were successful. K-Mart and Shoppers City were not interested; Holiday Village expressed initial interest, but declined to pursue negotiations thereafter, for internal financial reasons; and Target, with whom discussions were held intermittently for more than a year, dropped its consideration of the site by reason of the physical limitations of the building.

17. A short time after being restored to possession of the premises, commencing in the fall of 1973, Condor expanded its efforts to find a single tenant for the building, for either retail or office use, personally contacting representatives of many of the major companies and governmental agencies in the area. In addition, it placed a sign on the building indicating its availability for lease and contacted a considerable

number of local realtors known to it, or with whom it regularly deals, enlisting their aid on non-exclusive agency bases in finding a tenant. None of these efforts, which have continued intermittently to the present time, produced any concrete expressions of interest by prospective tenants.

18. In the late fall of 1973 and the winter of 1973-74, Condor broadened its efforts to include a possible subdivision of the leased premises into multiple retail or office units, proposed uses which would necessarily involve heavy expenditures for renovation and improvements. Among other things, Condor retained an architect to prepare site and floor plans for a proposed shopping mall, and contacted several drug store and hardware store concerns in an effort to interest one of them in becoming a lead or "anchor" tenant in such a development. Again, its efforts were unsuccessful.

19. Beginning in May 1974, and continuing to the present time, Condor has run

daily ads in the classified section of the principal Minneapolis and St. Paul newspapers, offering the leased premises for lease, for a variety of uses ranging from retain or commercial to temporary storage. The ads have not produced any serious or concrete expressions of interest from prospective tenants.

20. During the summer of 1974 and again during the past few months, Condor undertook a telephone solicitation program, involving the use of the Yellow Pages to canvass business and commercial establishments potentially interested in leasing space for office or retail use. These efforts have likewise been unsuccessful to date.

21. In late 1974, during the course of its efforts, Condor made written proposals for partial occupancy to two governmental agencies, the Department of Administration of the State of Minnesota and the Ramsey County Welfare Department.

Neither agency had expressed any real interest in the premises at any time, and neither made a counter-proposal. The State of Minnesota considered Condor's proposal to be reasonable, but was not interested, and secured other space. The Welfare Department solicited the proposal from Condor in the first instance, for possible future budgetary reasons.

* * *

24. In connection with its efforts to find a tenant, in late 1974 and early 1975, Condor permitted three prospective tenants to take partial occupancy of the premises for short periods of time, on a trial basis, in unsuccessful attempts to interest them in the property.

* * *

25. At no time has Condor received, refused to consider or rejected any proposal from a prospective tenant relating to the rental of either all or part of the leased premises.

26. From and after the time that Condor was restored to possession of the property, Arlen and Atlantic have themselves made considerable efforts to find a replacement tenant or tenants, in conjunction with their efforts to re-let the other locations in the area vacated by Atlantic. Among other things, Arlen and Atlantic conducted an advertising campaign in the fall of 1973, by newspaper, radio and television, geared primarily to real estate brokers, offering to pay commissions for obtaining tenants for any of the properties, including the leased premises; gave wide trade and local business circulation to a brochure covering the leased premises, offering it for sale or rent; and retained a St. Paul realtor, on a non-exclusive basis, to find a tenant for the property, a non-exclusive agency which remains in effect to the present time.

27. The efforts of Arlen and Atlantic to re-let their other locations have been more extensive than their efforts to obtain

a tenant for the premises leased from Condor, principally by reason of Arlen's ownership of the buildings at the other locations and its longer-term financial commitments there. Additionally, the other stores are in suburban areas generally more desirable to prospective tenants. All of such locations were eventually re-let to new tenants, under new leases, in most instances at rentals considerably in excess of those provided in the existing leases. From the standpoint of the premises leased from Condor, however, the efforts of Arlen and Atlantic to procure a tenant have not produced a single, concrete expression of interest.

CONCLUSIONS OF LAW

* * *

4. Whether Condor fulfilled its duty of reasonable efforts is to be determined from all of the facts and circumstances of the case, including the terms of the existing Lease, the nature of the property involved,

and the nature and extent of Condor's efforts to find a tenant or tenants. Carpenter v. Wisniewski, 139 Ind. App. 325, 215 N.E.2d 882 (1966).

5. Condor has established by the evidence that, at all times from and after the unlawful detainer proceeding to date, it has fully and faithfully discharged its duty of reasonable efforts to mitigate its damages.

6. The record contains no evidence from which the Court might conclude, or infer, that had Condor taken additional or different action, its efforts may have met with success, in whole or in part. The evidence permits only the conclusion that Condor made a good faith and reasonable effort to find a tenant or tenants.

* * *